THE CONSTITUTIONS OF THE STATE OF NEW YORK. I.

AT the outbreak of the Revolution, the political interests of the people of the united colonies were entrusted to a Continental Congress, and provisional governments for the preservation of order were established in the separate colonies, to continue until the differences with the mother country should be adjusted. Originally, none of the colonies seems to have contemplated permanent separation from the British government. The provisional organizations thus established were necessarily ephemeral, although, from the exigencies of the times, they necessarily wielded great powers.

Whether the Union is older than the states or whether the states preceded the Union, is a much debated question. It may with certainty be affirmed that the Continental Congress gave the initiative to the establishment of nearly every state government. The earliest recommendations for the formation of state governments, came in response to requests to Congress from New Hampshire and Massachusetts, which were advised by Congress to form constitutions. In May, 1776, when it had become evident that a declaration of independence could not long be delayed, the Continental Congress passed a resolution, which, after an appropriate preamble, recommended to the several assemblies and conventions of the united colonies, where no government sufficient to the exigencies of their affairs had been created, to adopt such government as should, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular, and America in general.

The congress in New York, questioning its power, without popular consent, to make a constitution for the state, acting upon the resolution of the Continental Congress, recommended to the electors in the several counties either to authorize their

present deputies or to elect special delegates, to take into consideration the necessity and propriety of instituting such new government as was recommended by the Continental Congress; and, if deemed best, to institute and establish such government, to continue until future peace with Great Britain should render the same unnecessary.

The Constitution of 1777.

Pursuant to the latter recommendation, elections were held at which delegates to the first constitutional convention of the state were chosen. The convention assembled at White Plains on July 9, 1776, — New York city, the first place selected for its sessions, having then fallen into British hands. It was soon forced by the British from White Plains, and completed its work at Kingston, on April 20, 1777.

The convention numbered some of the greatest names in New York's revolutionary annals: John Jay, to whom a large part of the first constitution has been ascribed, Robert R. Livingston, Gouverneur Morris and James Duane.

There were few models to follow and improve, in fact, the work of framing a fundamental law for the state may fairly be said to have been undertaken in an almost unexplored field.

The constitution embraces the Declaration of Independence and the resolutions of the Continental and of the Colonial Congress. It then bases itself upon the proposition that no authority shall be exercised over the people of the state but such as shall be derived from and granted by them. This democratic platform is not fully borne out in the constitution itself, nor was the work of the convention submitted to the people for their ratification.

The convention provided for a bi-cameral legislature consisting of a senate and assembly, or house of assembly as it is also called, which were to convene once at least in every year for the dispatch of business. The assembly was to consist of seventy members elected annually in the several counties of the state in proportions fixed by the constitution. The qualifications of electors of assemblymen differed from those of electors

of senators. To be eligible to vote for an assemblyman it was necessary that the citizen offering his vote should have resided in the county six months immediately preceding election day, and also that he should be a freeholder possessing a freehold of the value of twenty pounds within the county of his residence or the lessee of a tenement of the yearly value of forty shillings. Any elector qualified to vote for an assemblyman was eligible to the office.

The basis of suffrage in the election of senators was much less democratic and selection to the senate was confined to fewer persons. The senate was to consist of twenty-four freeholders chosen by freeholders alone; and only such were entitled to vote as were possessed of freeholds of the value of one hundred pounds over all debts charged thereon. Senators were elected for four years and provision was made for the election of certain senators every year. The senate was divided into four classes of six each. The constitution ordained that at the first election six senators should be chosen to hold office one year, and a like number for two, three and four years, and that at each successive annual election one-fourth of the senate should be chosen. For the purpose of electing senators the state was divided into four great districts, and the constitution assigned to each district its number of senators. A majority of either house was to constitute a quorum, and each house was made the judge of the qualifications of its members, *etc.* The senate was restricted to a maximum of one hundred senators, and the assembly to a maximum of three hundred members. Provision was made for the taking of a census at the close of the war and at successive intervals of seven years afterwards, for the purpose of apportioning representation in the senate and the assembly according to the changing distribution of population throughout the state.

The supreme executive authority of the state was vested in a governor to be chosen every three years or as often as the seat of government should become vacant, by freeholders qualified to elect senators, and the election was to be held at the same time as the election of assemblymen. The constitution placed

no limitations upon the choice of electors for the office of governor other than that the person selected should be "a wise and discreet freeholder." By virtue of his office he was general and commander-in-chief of the militia and admiral of the navy, was empowered to convene the legislature on extraordinary occasions, and to prorogue it from time to time for not more than sixty days in any year. His duties corresponded with the functions of the governor under the present constitution, with one or two important exceptions. Impelled by fear of one man power, so characteristic of that age, the framers of the constitution did not invest the governor with veto power, but, upon the suggestion of Robert R. Livingston, adopted the following article:

ARTICLE III: And whereas laws inconsistent with the spirit of this constitution or with the public good, may be hastily and unadvisedly passed: Be it Ordained, That the Governor, for the time being, the Chancellor and the Judges of the Supreme Court, or any two of them, together with the Governor, shall be, and hereby are, constituted a council to revise all bills about to be passed into laws by the Legislature. And for that purpose shall assemble themselves, from time to time, when the Legislature shall be convened; for which nevertheless they shall not receive any salary or consideration under any pretence whatever. And that all bills which have passed the Senate and Assembly, shall, before they become laws, be presented to the said council for their revisal and consideration: and if upon such revision and consideration, it should appear improper to the said council or a majority of them, that the said bill should become a law of this State, that they return the same, together with their objections thereto in writing, to the Senate or House of Assembly, in whichsoever the same shall have originated, who shall enter the objections sent down by the council, at large, in their minutes, and proceed to reconsider the said bill. But if after such reconsideration, two-thirds of the said Senate or House of Assembly, shall, notwithstanding the said objections, agree to pass the same, it shall, together with the objections, be sent to the other branch of the legislature, where it shall also be reconsidered, and if approved by two-thirds of the members present, shall be a law.

And in order to prevent any unnecessary delays,

Be it further ordained, That if any bill shall not be returned by the council, within ten days after it shall have been presented, the same shall be a law, unless the Legislature shall, by their adjournment, render

a return of the said bill within ten days impracticable; in which case, the bill shall be returned on the first day of the meeting of the Legislature after the expiration of the said ten days.

The section of the constitution destined to exercise the most potent influence in the political history of the state was the provision for a council of appointment. This council consisted of the governor and four senators who were to be openly nominated and appointed by the assembly every year, one senator from each of the four senatorial districts; senators were not eligible to the council for two years successively. A majority of the council constituted a quorum. The governor had no vote, but had a casting voice in the event of a tie. The language of the article which created this irresponsible body was very vague, although the intention of those who drafted it probably was that the governor should nominate and, with the advice and consent of the council, should appoint all officers except those for whose appointment the constitution made other express provision. The whole power of appointment in the state was thus, with few exceptions, lodged in the governor and a council of four senators, two of whom, with the governor, virtually held the appointing power. An equally despotic power of removal was placed in the same hands. We of to-day, who have swung to the opposite extreme of electing all officers, with difficulty appreciate the vast extent of power vested in the council. Very few offices were made elective by the first constitution Electors of certain qualifications voted for assemblymen, and a more restricted body of electors voted for senators and governor. Incumbents of all other offices, civil and military, including a large part of the judiciary, sheriffs, coroners, clerks, marshals, registers and notaries public, and even the mayors of cities were placed in power by the voice of the council of appointment.

Another peculiar feature of the constitution related to tenure of office. Almost all of the officers appointed by the council held their position during its pleasure.

The judiciary system was entirely different from that which has been familiar to us for forty years. The convention elected John Jay chief-justice, and Yates and Scott associate justices

of the supreme court of the state, and Robert R. Livingston, chancellor. It placed in the new constitution a provision that the chancellor, the judges of the supreme court and the first judge of the county court in every county should hold their offices during good behavior or until the age of sixty years. While the constitution deprived the council of appointment of power to remove these judicial officers, they were by its own terms displaced at too early an age. Chancellor Kent was thus forced to retire from the bench at sixty, although, like the dramatist Sophocles, he wrote his crowning work at a much more advanced age.

The constitution forbade the chancellor and judges of the court holding any other office except that of delegate to the general Congress. It instituted a court for the trial of impeachments, and for the correction of errors. The impeachment court was similar to that which still exists. The court of errors was to consist of the president of the senate, the senators, the chancellor and judges of the supreme court, or a majority of them. In the event of an appeal from the decision of the chancellor, the chancellor was required to inform the court of the reasons of his decree, but was not to have a voice in the final sentence. The judges of the supreme court, when their decisions were under review, were also deprived of a vote for affirmance or reversal.

The constitution adopted the common law of England, the statute law of England and Great Britain and the acts of the legislature of the colony of New York in force on April 20, 1777, as the law of the state, declared all grants of land by the king of Great Britain after a certain date void, and assured to every one the free exercise of religion. It also ordained that as ministers of the gospel and priests were dedicated to the service of God and the cure of souls and ought not to be diverted from the great duties of their functions, no minister of the gospel nor priest of any denomination should be eligible to any civil or military office in the state.

One patent defect in the constitution was its failure to make provision for its own amendment. Like all the early state con-

stitutions with the exception of that of Massachusetts, it was never submitted to the people nor ratified by them. It was merely adopted by the convention, which ordained that it should be the constitution of the state.

In April, 1801, the legislature passed an act by which it proposed to the citizens of the state to elect by ballot delegates to meet in convention

> for the purpose of considering the parts of the constitution of this State respecting the number of Senators and members of Assembly in this State and with power to reduce and limit the number of them as the said Convention might deem proper; and also for the purpose of considering and determining the true construction of the Twenty-third article of the Constitution of this State relative to the right of nomination to office.

The people selected delegates to the convention and the convention, without submitting any subject to the people for ratification, modified the constitution in the following particulars:

It declared that the number of members of the assembly thereafter to be elected should be one hundred and should never exceed one hundred and fifty, and that the legislature at its next session should apportion the said one hundred members of the assembly among the several counties of the state as nearly as possible according to the number of electors to be found in each county, as shown by the census directed to be taken that year. It fixed the membership of the senate permanently at thirty-two and, as the senate then contained a larger number of members, made appropriate provisions for vacating the seats of certain senators. It also ordained that the assembly should be increased at the rate of two members a year, until the maximum number (150) should be attained, and made provisions for future apportionments of senators and members of assembly.

The only other purpose for which the convention had been summoned, was to determine the true construction of that article of the first constitution which vested in the council of appointment the power of nominating and appointing most of the officials throughout the state.

The precise question submitted to the convention was: —

Does the constitution clothe the governor with the sole right of nomination, or is that prerogative vested concurrently in all the members of the council?

The language of the article is certainly obscure, but for seventeen years the practice had been to consider the right of nomination as exclusively vested in the governor, with the right of confirmation in the whole council. But in 1794 a vacancy occurred in the supreme court. George Clinton, a Republican, was then governor of the state. A majority of the council were Federalists, and the Federalists were anxious to bestow the office on a judge of the Federalist faith. Accordingly one of the Federalist members of the council nominated Egbert Benson to the vacant office and his appointment was carried by a majority vote, despite Clinton's protest that the power to nominate belonged exclusively to himself.

After John Jay became governor of the state, the complexion of the council was so changed that the Republicans had a majority, and Jay, a Federalist, found himself in the same predicament in which Governor Clinton had been placed. DeWitt Clinton and Ambrose Spencer, then members of the council and in political accord, warmly insisted upon their right to nominate, which Jay as vigorously denied. These differences of opinion became so bitter and each side clung so tenaciously to its opinion, that Jay broke up the council and appealed to the legislature to determine the meaning of the constitution, but that body was either unable or unwilling to do so. DeWitt Clinton was one of the delegates to the convention of 1801 and there defended his action in the council of appointment, and won a majority of the convention to his views. Daniel D. Tompkins, then a young man, was also a delegate, but he argued that the exclusive power of nomination was in the governor. Had the construction that the governor alone was empowered to nominate been adopted, responsibility for bad nominations would have been fixed upon him, but the new interpretation exonerated him from all responsibility, for a nomination and appointment could be obtained not only without his aid, but even against his protest.

Armed with this construction of the constitution, the council of appointment proceeded to an even more tyrannical use of its power. The constitution provided that new commissions should be issued to the judges of the county courts other than to the first judge, and to the justices of the peace, once at least in every three years. The council now concluded that new commissions might issue oftener, at its pleasure, because the maximum limit imposed by the constitution was three years. The result of this construction was that these judicial officers were removed as often as the political complexion of the council underwent a change, an event which might happen every year.

The vast powers of the council of appointment were too often employed for personal or party advantage, regardless of the public welfare. When the Republicans predominated in the council, they made a "clean sweep" of Federalists; and the Federalists turned out all Republicans as soon as the council fell into their hands. The whole official machinery of the state was controlled at Albany and every year witnessed a disgraceful scramble for office, the influence of which was felt from the capital to the remotest parts of the state. The irresponsible and despotic power of the council converted it into a great central machine, in absolute command of all political patronage, with its agents in every county. Those, who, like DeWitt Clinton, made the most remorseless use of the machine, suffered most from it, when it fell into the hands of their political enemies. Political enmity too often led to personal hatreds and, in more than one instance, to deadly feuds.

The Constitution of 1822.

The desire to abolish the council of appointment was one of the chief reasons for calling the convention of 1821. Public opinion had for several years demanded the abolition of this council and of the council of revision, and there grew up concurrently a strong desire for an extension of the right of suffrage. The legislature of 1820, accordingly, adopted a bill calling a convention and providing for the election of delegates. The bill was vetoed by the council of revision, Chancellor Kent writing

the opinion, on tne ground that a convention could not constitutionally be called, until the people had first decided that it should be held, and that the bill was also defective in not directing the separate submission to the people of all amendments which the convention might propose, the bill providing only for popular ratification or rejection as a whole.

On March 13, 1821, an act was passed, recommending a convention. The act provided that all free male citizens of twenty-one years and upwards who were freeholders, or paid taxes, or were members of the militia or of a volunteer corps, together with such as were exempt from taxation or militia duty, or who had been assessed or who had commuted for work on the public highways, should be allowed to vote by ballot for three days in the town or ward of actual residence, for delegates. The delegates were to be chosen the same as members of the assembly, from the cities and counties of the state. All voters for delegates were to be eligible. The convention was to submit its proposed amendments to the decision of the citizens of the state entitled to vote for delegates, together or in distinct propositions as the convention should deem expedient.

The law, it will be perceived, opened the convention to a larger number of citizens than were entitled to the suffrage under the constitution of 1777.

Four fundamental changes were wrought by the convention of 1821: 1, Abolition of the council of appointment; 2, Abolition of the council of revision; 3, Extension of the elective franchise; 4, Increase of the governor's powers.

First: The project of abolishing the council of appointment met with no opposition in the convention of 1821. The report of the committee upon the council shows how enormous was its patronage. Eight thousand two hundred and eighty-seven military and six thousand six hundred and sixty-three civil officers held their commissions from it and in most instances at will.

Second: The council of revision was abrogated. This council became unpopular during the war of 1812, for while the two houses of the legislature sought to uphold the arm of the Presi-

dent and of Congress, the chancellor and the judges of the council were in sympathy with the Federalists and opposed to the war. The opprobrium which the vetoes of the council during this period brought upon it cannot be better described than in the language of Martin Van Buren, in an address to the convention of 1821, while the veto clause was under debate:

> The scenes which passed within these walls during the darkest period of the late war cannot be forgotten. It is well known that the two houses of the legislature were divided; while, in the one house we were exerting ourselves to provide for the defense of the country, the other house was preparing impeachments against the executive for appropriating money without law for the defense of the state. But the effort was unavailing. An election intervened and the people, with honorable fidelity to the best interests of their country, returned a legislature ready and willing to apply the public resources for the public defense. They did so. They passed a variety of acts called for by the exigencies of our country. But from the council of revision were fulminated objections to the passage of those acts — objections which were industriously circulated throughout the state, to foment the elements of faction. Beyond all doubt at that moment was produced the sentiment which has led to the unanimous vote to abolish the council. The legislature had exerted themselves in the public defense; and the object of these objections was to impress the public mind with a belief that their representatives were treading under foot the constitution and laws of their country. The public voice on that occasion was open and decided; and it has ever since continued to set in a current wide and deep against the council.

Mr. Duer, another member of the convention, described it as "an executive council of which the members hold their seats for life, and possess an efficient control over the acts and proceedings of your legislature."

Third: Next to the abolition of the council of appointment, the most important service rendered by the convention of 1821 was an extension of the right of suffrage. This was accomplished, first, by lessening the property qualifications established by the old constitution, and, secondly, by making the qualifications of electors of senators and governor the same as those of electors of assemblymen.

The convention followed close upon the settlement of the controversy over the admission of Missouri into the Union, and a determined movement was made by some of the delegates, led by Peter A. Jay, to extend the right of suffrage to blacks upon the same terms as to white men. As this proposition met with great opposition, the decision of the convention was a compromise. All male citizens, of the age of twenty-one years, inhabitants of the state for one year preceding an election and for six months residents of a town or county, who, within the year, had served in the militia or paid a tax to the state or county upon real or personal property, were endowed with the right of suffrage. But it was provided, that no man of color should have a vote who had not been a citizen of the state for three years and for one year next preceding any election, and who was not the owner of a freehold estate of the value of two hundred and fifty dollars free and clear, upon which he had been rated and paid taxes.

In 1826 all property qualifications were abandoned, except in the case of colored citizens. It is a striking fact that, had the views of some members of the convention of 1821 prevailed, and colored citizens been denied the suffrage altogether, a privilege exercised under the old constitution by about thirty thousand colored citizens would have been taken away. Happily no such injustice was done. As Mr. Jay well said, the convention had been summoned to extend the franchise, — not to disfranchise anybody.

Under the first constitution the state presented the anomaly of colored men held in slavery and of free colored persons exercising the right to vote. Such an anomaly could not long be maintained, and before many years the legislature enacted a law giving freedom to every child born of a slave within the state after July 4, 1799, and to every slave born after that date elsewhere, but brought within the state by any person intending permanently to reside within the state. In 1817 a statute was passed declaring that every negro or mulatto born within the state before July 4, 1799, should be free after July 4, 1827.

One of the great battles in the convention of 1821 was over

the proposition to make the qualifications of electors of the senate and governor the same as those of the electors of the assemblymen. In the first convention the great landed proprietors were all represented, and the constitution which was then framed retained the suffrage in the hands of the owners of large estates and of their tenants. As the landed interest was all powerful in the election of senators and of the governor, and as it had a predominant influence in the election of assemblymen, the council of appointment was naturally subservient to it. It was thus able not only to control the appointment of justices and the political patronage of the state, but also, through the council of revision, to possess a negative on all legislation adverse to its interests. As public opinion in 1821 required an extension of the suffrage, the landed proprietors foresaw that they would lose control of the assembly, but they desired to retain their influence in the senate. Chancellor Kent and Judge Spencer were the chief advocates of a restricted suffrage, and their views were ably and successfully contested by Erastus Root, Martin Van Buren and others. Had the election of senators been kept in the hands of the landed class, the tendency would have been strong to the enactment of class legislation and the establishment of class influence in the state. Chancellor Kent and Judge Spencer were unquestionably honest in their views; but, while their dislike of universal suffrage was unwarranted, it must be admitted even by the warmest friends of unrestricted suffrage that much of their fear was justified, and that we have yet to learn, particularly in cities, how to secure to the intelligent voter that proportion of influence which he ought to exercise.

Fourth: Another great achievement of the convention of 1821 was the modification of the position of governor. There is the greatest difference between the powers of the governor under the old constitution and under that of 1822. Under the first constitution as modified by the amendments of 1801, as also under the early constitutions of our sister states, he was divested of almost every power. Under the constitution framed in 1821 he was invested with the greatest powers which have

ever been exercised by persons holding the office of governor, during the entire history of the state. He was then given a veto upon all legislation and, subject to confirmation by the senate, the right to appoint a large proportion of state officials including all judicial officers except justices of the peace. He was also clothed with the power to remove certain elective officers.

The veto and appointing power which was thus vested in the governor, rendered him so much more of a factor in politics than he had been under the old constitution, that the convention deemed it necessary to shorten his term of office so as to increase his responsibility to the electors of the state. Advocates of a three year term were not wanting, but the more conservative members, at the head of whom was Van Buren, favored a two year term on the ground that it gave the governor sufficient time to qualify himself for the administration of his office, and at the same time held him sufficiently accountable to the people. Under the constitution of 1777 any person could be governor if he were a freeholder. The convention of 1821 retained the freehold restriction, but limited the office to citizens of the United States of the age of at least thirty years, residents within the state at least five years prior to the election. But absence from the state during that period on business of the state or the United States was not to render a candidate ineligible.

In various other particulars, the constitution departed from the first form of government. The state was subdivided into eight senatorial districts, because the old districts were so large that their inhabitants were unable to vote intelligently for senators, inasmuch as it had often happened that men who were not well known in their communities received nominations, and in some instances votes sufficient to elect were cast, under a misapprehension as to the identity of the candidate. But, as formerly, all senators were required to be freeholders.

The convention enlarged the judicial force of the state, increasing the number of justices of the supreme court. It further provided for the subdivision of the state into not less

than four, nor more than eight circuits, and for the appointment of circuit judges by the governor, subject to confirmation by the senate, who were to hold their offices by the same tenure as justices of the supreme court and who were clothed with the powers of supreme court justices at chambers, and at *nisi prius* and in courts of oyer and terminer. When the first constitution was framed, the English law of libel, which then became the law of the state, was extremely narrow and illiberal, making it the province of the jury simply to ascertain whether the so-called libel had been published, and leaving the question of the fact of libel to the court. Through the efforts of Erskine, Fox and Burke, the English law had been ameliorated, and a similar result had been achieved by Hamilton in this state. The convention of 1821, adopting the statute of 1805, provided that in all prosecution or indictments for libel, the jury were to be the judges both of the law and the fact.

The convention also rectified an omission in the first constitution by making specific provision for the amendment of the new. Only one mode of amendment, however, was then adopted. Amendments were first to be approved by a majority of the members elected to each of the two houses and then agreed to by two-thirds of all the members elected to each house of the succeeding legislature. They were then to be submitted to the electors qualified to vote for members of the legislature and, when ratified by a majority of the electors voting thereon, were to become part of the constitution.

Section 9, of Article VII, of the new constitution made the consent of two-thirds of the members elected to each branch of the legislature essential to the passage of every bill appropriating the public moneys or property for local or private purposes, or creating, continuing, altering or renewing any body politic or corporate.

This section records the first public victory in the state over the advocates of exclusive franchises to individuals or corporations. The triumph became more complete when provisions were inserted in the constitution of 1846 requiring banking and other private corporations to be organized under general laws,

and forbidding the legislature to create corporations by special act, for other than municipal purposes.

At common law the exercise of banking powers was a universal right. The common law continued in existence in the state of New York until 1804. Between the date of the adoption of the first constitution and that year, very few bank charters were granted, owing to the reluctance of legislatures to consent to the issue of paper money, the evils of which had caused much suffering during the revolutionary period. In 1804, the legislature of New York made banking a franchise or privilege dependent upon its grant; and this unfortunate policy was continued in the state until the year 1838, when the incorporation of banks was provided for by general law.

While banking continued to be a legislative privilege, and, even before the act of 1804, when special charters were sought from the legislature, so bitter was the spirit of faction that charters were often refused to applicants whose politics differed from the politics of the majority of the legislature. Federalists refused Republican applications, and Republicans retaliated in their turn. In 1799, the Manhattan company, whose promoters were Republican, obtained a charter, ostensibly as a water company, but in reality merely for the purpose of carrying on a banking business. Increased water facilities were then sorely needed in the city of New York, and the incorporators presented at Albany a charter, skilfully devised by Aaron Burr, containing one subsidiary sentence, which gave the company permission to invest its surplus capital in any business not inconsistent with the Federal or state constitution. Had the applicants boldly requested a bank charter, their request would have been denied.

A few years later, a company of Federalists sought to charter the Merchants' bank, but the legislature refused to grant a charter, on the ground that the concession would be injurious to the Republican party. Such a proscriptive abuse of legislative functions impelled capitalists to the employment of corruption, as the only means left open for the attainment of their aims. Where partisanship and faction so degrading were exhib-

ited, it was not surprising that bribery was found to be the only efficacious means of extorting favors from political adversaries. In 1812, the promoters of the Bank of America, who were Federalists, sought a franchise. The Republicans in the legislature opposed it on the plea that there were too many banks in New York city; but as the bank's agents had, by judicious distribution of stock, managed to get a bill through the legislature, despite charges of fraud, and, as it was popularly known that a majority of the council of revision, being Federalists, would approve the bill, Governor Tomkins prorogued[1] the legislature, alleging as the reason of his remarkable action, that it was openly asserted that legislators had been bribed to vote for the bill. The factions and corruptions engendered by controversies over bank charters led the convention of 1821 to adopt the section which has been cited, but, as Hammond says, the provision failed to remedy the evil; it simply required capitalists to buy up a larger number of members.

The convention of 1821 was an unqualified victory for popular rights. It sensibly impaired, although it did not destroy, the system of central government established by the old constitution. It enfranchised a large and deserving class of citizens; it made the governor a real power and differentiated the government more clearly into three departments, executive, legislative and judicial, all of which were fused under the first charter. It rendered the senate and the governor agents of the people as fully as the assemblymen. Although it retained the framework of the old judicial fabric, it increased the judicial force. It also incorporated into the organic law a fuller bill of rights. For the omnipotent council of appointment, it substituted a somewhat complex system of appointments, which had, at least, the merit of dispersing power. The secretary of state, comptroller, treasurer, attorney-general, surveyor-general and commissary-general were appointed by the senate and assembly, either by separate agreement or on joint ballot. Mayors of cities were chosen by the municipal common councils. Justices

[1] Probably the only occasion when the governor's power of prorogation was exercised. This power was taken away by the convention of 1821.

of the peace became entitled to their commissions by analogous action of boards of supervisors and county judges, although in a few years (1826) these officers were made elective. Clerks of courts, other than county clerks, were appointed by the judges of their respective courts, and district attorneys were selected by the judges of the county courts, while sheriffs and county clerks were chosen by the electors of their respective counties but were removable by the governor, after an opportunity to be heard in their own defence.

The constitution submitted by the delegates was adopted by the people, as an entirety, in February, 1822.

While but two amendments had been made to the first constitution, ten separate propositions of amendment to the second constitution were at different times submitted by the legislature to the voters of the state, six of which were adopted. The most important were the amendment of 1826, abolishing all property qualifications for white voters; the amendment of 1834, giving the electors of the city of New York qualified to vote for other municipal officers, the right to vote for mayor, thus taking away from the common council of that city the appointment of that official; and the extension in 1838 of a like privilege to the voters in all the cities of the state.

The subject of the appointment of mayors of cities was brought before the legislature in 1831, and motions were made in the senate favoring the appointment of these officials by the governor, by the governor and senate and also by the legislature. William H. Seward, who was then a member of the senate from the old seventh district, vigorously opposed all these plans and argued that the qualified voters of the city of New York should elect the city's chief magistrate, and that a like right should be extended to the people of all the cities of the state.

The constitution of 1822 remained in existence for twenty-four years. During a large part of the time, the state enjoyed almost unexampled prosperity. Men of great ability and sagacity, most of whom afterwards acquired national reputation, filled its gubernatorial chair. Its judiciary numbered some

of the most exalted names in the annals of its jurisprudence. The advancement of the state was, however, largely due to its canal system, which invited immigration, augmented the revenues of the state, imparted value to the land in its middle tier of counties, and summoned villages and towns into life. The Appalachian range, which in the states south of New York raises a barrier between the Atlantic ocean and the Mississippi valley, falls away to a level between Lake Erie and the Hudson river. That nature had made it possible for the Great Lakes and the Hudson river to be united by a canal through New York state, had impressed far-seeing men even in the last century, but it was reserved for DeWitt Clinton to give practical form to their ideas. Scarcely had the Erie canal become an accomplished fact before the idea of lateral canals intersecting the chain of lakes in the centre of the state was conceived, and acts were passed for their construction. After ten years of use it was found that the Erie canal needed enlargement and improvement; and, in 1835, a law went into effect which authorized the canal commissioners to make improvements in the canal, whenever and to such extent as they should deem desirable. The act clothed the commissioners with great, and perhaps questionable powers, but it was shorn of much of its danger, as well as its utility, by the clause which forbade the commissioners contracting for any improvements the cost of which could not be defrayed out of the surplus revenues of the canals. As the work of enlargement authorized by this act did not proceed with sufficient rapidity to satisfy public demands, the legislature of 1838 took the subject under consideration. The canal commissioners reported to the assembly of that year that, by an expenditure of about $12,500,000, the canal could be made seventy feet in width and seven feet in depth and supplied with adequate gates and locks. The legislature thereupon passed a bill which Governor Marcy approved, authorizing the commissioners to borrow $4,000,000 on the credit of the state for the enlargement of the canal. The act further directed the commissioners to prepare and put under contract, with as little delay as possible, such portions of the work as were mentioned

in their report to the assembly and also such other portions as, in the opinion of the canal board, would best secure the completion of the entire enlargement with double locks on the whole line. Thus empowered, the canal commissioners made contracts, pledging the state treasury to an expenditure of about $12,500,000, nearly all of which sum was made payable before May 1, 1842. Laws were also passed during these years for improvements in the lateral canals, and the public credit was liberally extended to various railroad enterprises, among others, to the amount of $3,000,000, to the Erie railroad.

In the following year (1839), the canal commissioners were asked to revise their estimates and report again to the legislature. It was then discovered that the expenditure necessary to complete the improvements on the scale contemplated in their previous report had risen to $23,000,000, — double the original estimates; and that, with the other public improvements undertaken or assisted by the state, the state had involved itself in a possible indebtedness of $30,000,000. These facts were adverted to by Governor Seward, in his annual message to the legislature in 1840, 1841 and 1842, but, true to the policy of internal improvements of which he was a life-long advocate, the governor argued in favor of continuing the work which had been undertaken, but of keeping the expenditures therefor within an amount the interest upon which could be paid from the surplus revenues of the canals.

These events followed shortly upon the commercial panic of 1837. The credit of most of our sister states was then at the lowest ebb, and foreign confidence in all American securities was much weakened by the policy of partial repudiation which had been adopted in some of the states. The revelations of the canal commissioners had a disastrous effect upon the credit of New York. Its stocks rapidly depreciated, money could not be borrowed for public uses for long terms, and it was with great difficulty that temporary loans could be procured to meet even the most pressing emergencies.

In 1842, the Democrats secured the ascendency in the state legislature. The policy of their leaders was to retrieve the

credit of the state by at once stopping all improvements and by levying taxes sufficient, with the canal revenues, to meet the yearly interest on the state debt and to provide for the yearly expenses of the state government. Under the leadership of Michael Hoffman a bill was passed through the legislature, known as the celebrated finance bill of 1842, to which the governor gave a reluctant approval.

The policy of this act, called also the suspension act, was summary. It put an end to further expenditures for improvements, by suspending all work on the canals, except such as was strictly necessary in order to preserve and render useful what had already been done. To meet the state's pressing necessities, it imposed a direct tax upon real and personal property, and authorized the issue of bonds and pledged the surplus canal tolls to the redemption of the canal debt. The action of the legislature soon effected a marked improvement in the credit of the state and in the value of its stock.

So long as the "pay as you go" policy of the act of 1842 was maintained, the completion of the contemplated enlargement of the Erie canal became practically impossible. It was not therefore long, before the Democrats began to divide upon the question of maintaining the act of 1842 in all its strictness. In 1844, the party was split into two factions; one branch, the radicals or "Barnburners," were for rigidly upholding the system of 1842 and applying all surplus tolls to the extinction of the public debt. The conservatives or "Hunkers" argued that the surplus should be devoted to the completion of the public enterprises which had been suspended by the act of 1842. But, whatever conflicting opinions were held as to the desirability of finishing the incomplete public works, public sentiment was awakened to the necessity of maintaining the policy of keeping part of the canal revenues pledged to the payment of the canal debt, and to the necessity of limiting the debt-contracting power of the legislature. Resolutions embodying these ideas were introduced into successive legislatures and barely failed of the vote required to permit their submission to the people.

In 1845, the legislature approved a bill appropriating $197,000 from the revenues of the canals to various improvements in the Crooked Lake, the Genesee Valley, the Black River, and the Erie canals. The bill was in reality an effort to undermine the statute of 1842 and it therefore met with a prompt and emphatic veto from Governor Wright. The following portions of the Governor's veto message are quoted, because they serve to explain the circumstances which led to the convention of 1846:

Another reason why I consider the present an unfortunate time to make this change of policy, is the evidence before us of a determinate disposition in the public mind to remodel our constitutional system, in reference to expenditures of this description. Ever since the prostration of the credit of the state in 1841, and the consequent suspension of the public works and establishment of the financial system adopted by the legislature of 1842, the attention of our people has been drawn to the necessity of some further constitutional protection against the danger of enduring debt and perpetual taxation. Extended discussion for two years resulted in action by the last legislature, originating and submitting to the people, previous to the last election, specific amendments to the constitution, taking two most important positions in reference to the further increase of our public debt for these objects, namely:

1. That no debt should be hereafter contracted for expenditures like these, until the law authorizing the loan should have been submitted to the people and expressly approved by them, by their direct votes at the polls and

2. That no law submitted to the people for their appropriation, should contain authority to make loans for but a single work or object of expenditure, and should contain irrepealable provisions for a sinking fund to meet the interest and pay off the principal of the debt within a specified period.

This legislature, elected with reference to these provisions as amendments proposed to the constitution of the state, has expressed its sense, the one house by the constitutional vote of two-thirds, and the other by a majority in their favor, thus reflecting most truly, as I believe, the deliberate sense and wish of a majority of the people of the state. The propositions, however, having failed to receive the constitutional vote of two-thirds of the assembly, cannot be submitted to the people, according to the provisions contained in the constitution for its amendment and have therefore failed. This failure, together with that of other

amendments similarly proposed and similarly failing, has secured the passage of a law for the call of a Convention of the people of the state to amend the constitution.

Believing that the convention would be held, the governor declared that the resumption of public works and the making of new contracts would embarrass its proceedings. The measure not receiving the requisite vote in either house to pass it over his veto, was defeated.

The Constitution of 1846.

The convention of 1846 was the first constitutional convention ever assembled in this state which really deserved to be styled a people's convention. The deputies or delegates in the convention of 1777 represented mainly the proprietors of great estates and their tenants. The delegates to the convention of 1821 were chosen by owners of real or personal property. The delegates to the convention of 1846 were elected upon the basis of almost universal suffrage. The truly popular origin of the convention may serve to explain its apotheosis of the notion that all power emanates from the people. The cardinal distinction between this convention and all its predecessors is that its work seems chiefly to be a revesting in the people of the state of delegated power. It is remarkable less in regard to the power which it bestows, than that which it resumes. The constitution of 1777, like all the early state constitutions, gave the legislature undue predominance. The constitution of 1822 took away from the legislature a large share of the appointing power, and vested it partially in the governor and partially in the senate and assembly. It also gave the governor the right to veto bills passed by the two houses of the legislature. But each of these constitutions left the area of legislation unrestricted. The chief innovation of the constitution of 1846 was in limiting the sphere of legislative action. It accomplished this result in two modes: in the first place, it deprived the legislature of power to incur debts or to undertake costly schemes of public improvement, without direct popular consent, and forbade it loaning the credit of the state to private capital.

In the second place, it removed all fetters from industry and commerce by prohibiting the granting of special franchises or privileges, and by requiring that all corporations other than municipal should be created under general laws. The restraints which the constitution of 1846 placed upon the legislative branch of the state government are the most valuable service performed by the convention. Articles VII and VIII of the constitution of 1846 embody these provisions. These articles form a new bill of rights, no less important than any which the third estate ever wrested from monarch or nobility. They assert the supremacy of the people over the legislature, of the principal over the agent, and add a needed bulwark against the tyranny of a temporary majority, — one of the greatest dangers incident to a republican government. We are prone to think that the constitution of 1846 is chiefly memorable because it made judicial and state offices elective; but by far its greatest contribution to the political development of the commonwealth is to be found in the limitations with which it surrounded the legislative department. These provisions have not checked the commercial or industrial progress of the state nor rendered its supremacy uncertain, but they have saved it from such gigantic indebtedness as has hitherto weighed upon the nation and still burdens our counties, cities and towns.

The convention reported a new constitution which embodied the greater part of the old. The radical changes related to:

1. The canals; internal improvements; public revenue and public debts.
2. Incorporations.
3. The election of state, judicial and local officers.
4. The enlargement of the number of senate districts, and the substitution of district for county representation in the assembly.
5. The re-organization of the judiciary and reformation in the system of legal precedure.
6. The methods of amending the constitution.

First: The subject of public improvements and public debts, which was the chief cause for the summoning of the convention,

is treated in article VII of the constitution of 1846. As originally ratified, the article first provided for keeping the canals of the state in repair. It then applied $1,300,000 of the surplus revenues from the canals every year until 1855, to the liquidation of the principal and interest of the canal debt, and thereafter devoted $1,700,000 annually to the same purposes. It set apart annually $350,000, and, after the extinguishment of the canal debt, $1,500,000, to the redemption of the principal and interest of that part of the state debt called the general fund debt, which it was claimed in the convention had been incurred for the canals and which therefore the canal revenues ought, equitably, to defray. As in the legislatures of 1842 and 1844, so in the convention, were to be found earnest advocates for and against the enlargement and completion of the canals. With some, the extinguishment of the debts in the shortest period, at least within the period contemplated by the law of 1842, was the paramount idea. Others were animated by the desire to see the works completed and enlarged so as to produce the fullest benefit to the state and to prevent the diversion of western trade to other Atlantic ports, even at the cost of delaying the liquidation of the debt, and it was the purpose of this class to secure provision out of the canal revenues for the requisite completion and enlargement. The constitution made provision for the necessary work, and so fortunate was the state, that she was able to pay the debts then charged upon the canal revenues, in as short a time as was anticipated by those most desirous of seeing them promptly extinguished.

Article VII also directed that the legislature should never sell, lease or dispose of the canals or the salt springs belonging to the state.

But the most important provisions of the article were contained in sections 8 to 14 inclusive, and they have remained intact to the present day. Section 8 forbids the payment of money or funds of the state except in pursuance of appropriations by law; section 9 declares that the credit of the state shall not in any manner be given or loaned to or in aid of an individual, association, or corporation, thus preventing subsidies

to railroads or to other public enterprises originated by private capital; section 10 empowers the legislature to contract debts in order to meet casual deficits or failures in revenue or expenses not provided for, but such debts, direct and contingent, singly or in the aggregate, shall not at any time exceed one million dollars. Moneys raised to pay such debts must be rigidly applied to the specific purposes for which they have been obtained. Section 11 declares that these limitations shall not apply in extraordinary emergencies. The state is therefore left free to contract debts in any amount, in order to repel invasion, suppress insurrection, or defend itself in war; but moneys raised for any of these objects must be sacredly devoted solely to their accomplishment. Section 12 ordains that, with the exception of the debts specified in the tenth and eleventh sections, the state shall contract no debt except in pursuance of a law specifying the sole work and object for which the debt is incurred; that the law must also provide for the collection of a direct annual tax, sufficient to pay the interest on the debt as it falls due and the principal within a period of eighteen years from the time when the debt shall have been contracted; and that every such law, before it can take effect, must be submitted to the people and be sustained by a majority of all the votes cast for and against it. Even after popular sanction has been thus obtained, the legislature may repeal the law or stop the work. To prevent the enactment of such laws in moments of public excitement, the section provides that no such measure shall be voted upon by the people until three months shall have elapsed since its passage through the legislature. Nor can a vote be taken upon any such law when any other enactment or bill, or any amendment to the constitution is to be voted upon. Section 13 provides that every law which imposes, continues or revives a tax, shall distinctly state the tax and the object to which it is to be applied, without reference to any other law, in order to fix the tax or object. Section 14 requires that the vote in either house upon all such measures shall be taken by ayes and noes, which shall be entered on the journals, and that three-fifths of all the members elected to either house shall be

necessary to constitute a quorum whenever such measures are to be voted upon.

Second: Article VIII of the constitution of 1846 contains the second class of restraints on the state legislature, namely, those which relate to the creation of corporations.

The state had long suffered from the evils of special legislation. The constitution of 1822 supplied a partial remedy by requiring the assent of two-thirds of the members elected, to every bill appropriating public money or property, for local or private purposes, or creating, continuing, altering or renewing any body politic or corporation. Mr. Wheaton, one of the delegates to the convention of 1821, offered a resolution in that body making it imperative on the legislature to enact general laws on the subject of private corporations, but his resolution was not adopted.

Article VIII of the present constitution represents the work of three separate committees of the convention of 1846, — the committee on municipal corporations, the committee on banking corporations, and the committee on incorporations other than banking and municipal. The reports of the several committees, so far as adopted by the convention, are contained in the article. The article forbids special charters for private incorporations, and renders the shareholders in a corporate enterprise responsible for corporate debts. As was well said in the convention:

> The people had seen a system existing by which the government had granted to particular individuals special privileges which had been refused to others, contrary to the great principle of equality among men. They had seen not only that, but that, when these special privileges, which were essential to the very nature of a corporation were exercised, they had the further privilege of immunity from loss arising from business, which other individuals had not from loss by their business.

Special prohibition of the granting of special charters for banking purposes is also inserted in the article; the legislature is forbidden to sanction in any manner the suspension of specie payments by any person or association issuing bank notes; and is required to provide for the registry of all bills issued to circulate as money and for their redemption in specie. Stockholders

in banks of circulation are made individually responsible for corporate debts to the extent of their shares, and bill holders are, in the event of the insolvency of a bank, given a preference over all its other creditors. As the Dartmouth College decision had placed all corporate charters theretofore granted above revocation, the constitution wisely reserved to the legislature the power of altering or repealing such charters as should be thereafter granted.

Third: Next in importance to the restrictions upon the law-making power imposed by the constitution of 1846 is the change which it made in the system of appointment. The first constitution vested the power of appointment, in all its amplitude, in the council of appointment; the second constitution clothed the governor and the senate with this function except in the case of state officers, who were to be elected by the two houses of the legislature. The policy of 1846 was decentralization. It gave to the people in their several localities the right to elect, not only the officers hitherto appointed by the governor, and the state officials previously elected by the senate and assembly, but also district attorneys, clerks of counties and, practically, all county, city, town and village officers. The power of removal, which the constitution of 1822 had divided between the governor and the legislature, was retained in the same hands, but the extent of the power was greatly increased. While the tendency in electing was decentralizing, the power of removal was centralized. The people elect, but either the governor and senate, or the legislature may remove for misconduct in office.

Fourth: The decentralizing spirit of the convention also wrought a change in the tenure of the senatorial office and in the mode of electing senators and assemblymen. The state was divided into thirty-two senatorial districts, and each district was to choose a senator every two years. County representation in the assembly was abolished and district representation substituted. The new constitution directed that members of assembly should be apportioned among the several counties of the state as nearly as might be according to the number

of their respective inhabitants, excluding aliens and persons of color not taxed, and should be chosen by single districts. But every county except Hamilton was insured at least one member. Provision was also made for a new census and a new re-apportionment every ten years. The defects of our present method of assembly representation have been recently discussed in the New York city press, and will be considered in a later article, in conjunction with the efforts of the convention of 1867 to return to the system adopted by the convention of 1821.

Fifth: The new constitution retained the court of impeachment, but abolished the court for the correction of errors. Chancery courts as separate organizations also ceased to exist, and the old expensive and tedious methods of taking testimony in equity cases were abolished. It would be a great advantage to suitors in the Federal tribunals if the same reform were introduced there. Under the present practice in the United States courts testimony in equity cases is taken before a master, and, as he has no power to pass upon evidence, all evidence presented by either party however irrelevant or immaterial must be accepted and printed for the use of the court.

The constitution of 1822 had abolished the former supreme court, thus "constitutionizing" the judges of that court out of office, among them such jurists as Van Ness and Spencer. The constitution of 1846 also created a new supreme court, investing it with general jurisdiction in law and in equity. It divided the state into eight judicial districts, of which New York city was to be one, the others to be bounded by county lines and to be compact and as nearly equal in population as possible, and allotted four supreme court justices to each district, excepting the district which was co-terminous with the city and county of New York, which was to elect as many such justices as the legislature might prescribe. The term of office was fixed at eight years. It established a court of appeals of eight judges, four of whom were to be elected by the electors of the state for eight years, the remaining four to be selected by methods to be provided by law, from the justices of the su-

preme court having the shortest time to serve. The judges of the court of appeals were to be so classified that one should go out of office every year; the judges of the supreme court were to be so classified that one judge in each district should go out of office at the end of every two years. Provision was also made for supplying vacancies in the membership of these tribunals.

The constitution also authorized the establishment of tribunals of conciliation, to hear cases voluntarily submitted by parties and to render judgment thereon. It required the first legislature convened after its adoption to appoint commissioners to revise the system of practice in the courts, which resulted in the simplified system of procedure subsequently adopted in this state and substantially copied in most of our sister states and even in England. It required the adoption of similar measures to secure the codification of the substantive law of the state, but, although the commissioners charged by the legislature with this duty, reported a code of the law many years ago, so great has been the hostility it has encountered from the bar that it has never been enacted nor has any code been substituted in its place.

Sixth: While the constitution of 1822 made provision for its amendment by legislative resolutions approved by the people, it did not provide for amendment by the process of a constitutional convention. The act of 1845, disregarding the express language of the constitution, provided for the election of delegates and the holding of a convention. Two views have been entertained as to this enactment; one is that although extra-constitutional, it was justifiable as a peaceful revolution. The other upholds its constitutionality, on the ground that the right of amendment by convention is a popular right underlying the constitution of every free people, which cannot be withdrawn from the people, notwithstanding the constitution may furnish other methods for amendment. This interesting discussion is set at rest in this state by article XIII of the constitution of 1846, which provides for ascertaining the popular desire for a convention, at least once in every twenty years, and for the

holding of a convention at shorter intervals whenever the people so will. Thus the constitution of 1846 secures two methods of amendment, the one by legislative initiation, sustained by popular vote, the other by a convention. This double method is now found in the constitution of many of the states. The history of the state demonstrates the practical value of this dual plan.

The fourteen articles which made up the constitution of 1846 were submitted for popular approval as a whole. The address of the delegates in convention to the people of the state well sums up their work:

> In these fourteen articles, they have reorganized the legislature; established more limited districts for the election of the members of that body and wholly separated it from the exercise of judicial power. The most important state officers have been made elective by the people of the State; and most of the officers of cities, towns and counties, are made elective by the voters of the locality they serve. They have abolished a host of useless offices. They have sought at once to reduce and decentralize the patronage of the executive government. They have rendered inviolate the funds devoted to education. After repeated failures in the legislature, they have provided a judicial system, adequate to the wants of a free people rapidly increasing in arts, culture, commerce and population. They have made provision for the payment of the whole state debt and the completion of the public works begun. While that debt is in progress of payment, they have provided a large contribution from the canal revenues towards the current revenues of the state and sufficient for that purpose when the state debt shall have been paid; and have placed strong safeguards against the recurrence of debt and improvident expenditures of the public money. They have agreed on important provisions in relation to the mode of creating incorporations and the liability of their members and have sought to render the business of banking more safe and responsible. They have incorporated many useful provisions more effectually to secure the people in their rights of person and property against the abuses of delegated power. They have modified the power of the legislature with the direct consent of the people, to amend the constitution from time to time and have secured to the people of the state, the right once in twenty years to pass directly on the question whether they will call a Convention for the revision of the Constitution.

J. HAMPDEN DOUGHERTY.